Supreme Court, U.S.
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No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

JAMES W. STOLL
Counsel of Record
ELISE BUSNY
BROWN RUDNICK
BERLACK ISRAELS LLP
One Financial Center
Boston, MA 02111
(617) 856-8200

Counsel for Respondent

May 9, 2003

180351

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether, assuming this Court has jurisdiction in light of the separate, adequate and independent state grounds supporting the dismissal, the Massachusetts Appeals Court's determination that the confirmation order was res judicata as to the Petitioner's counterclaims against Respondent was correct where the court's decision was based on the facts that:

(a) the plan of reorganization contained general language in the reservation clause;

(b) the Petitioner had ample opportunity to contest the plan or seek its modification; and

(c) statements made by counsel at the confirmation hearing were contradictory.

RULE 29.6 STATEMENT

The parent corporation of Respondent, Citizens Bank of Massachusetts, is Citizens Financial Group, Inc. No publicly held company owns 10% or more of the stock of Respondent.

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OPINIONS BELOW

The reproduction of the decision of the Massachusetts Appeals Court ("Appeals Court") in the Appendix to the Petition is missing the first two footnotes and misstates the correct caption of the case in that court; a correct copy is included in the Respondent's Appendix. (R. App. 1a-12a)[1] Moreover, in addition to the one decision of the Massachusetts Superior Court ("Superior Court") at Petitioner's Appendix 11a-34a, that court issued three subsequent decisions that are relevant to this appeal. Those opinions are unpublished, but are included, in chronological order, in the Respondent's Appendix. (R. App. 13a-54a)

STATEMENT OF THE CASE

The backdrop to this Petition is that the Petitioner, Bahig Bishay ("Bishay"), was a car dealer who entered into a $2.5 million demand loan in 1988 with a local Massachusetts bank that merged into Respondent, Citizens Bank of Massachusetts ("Citizens"), in 1994. Unable to repay the loan when called in 1989, Bishay sought and received multiple extensions of time to repay until he simply announced he would no longer pay in accordance with the terms of the then-operative forbearance agreement. When Citizens called the loan again for this default, Bishay threatened and remonstrated, but ultimately entered into another forbearance agreement that included a general release of all claims, real or imaged. Then Bishay defaulted again and Citizens commenced the inevitable collection proceedings. Bishay thereafter filed a limited two-count counterclaim based on alleged impropriety in Citizens' initial collection activities after it first declared a default. He asserted these claims despite the fact that he had signed a

1. The Petitioner's Appendix will be cited as (P. App.); the Respondent's as (R. App.).

general release covering the time period in question. Cognizant of this, he also alleged economic duress. In any event, almost immediately after this filing, Bishay sought cover in the Bankruptcy Court.[2] Six months later, the Bankruptcy Court removed Bishay as debtor-in-possession and appointed a Trustee due to his failure to put forth an acceptable plan of reorganization.[3] Thereafter, an amended plan of reorganization, first put forward by Citizens, was approved by the Bankruptcy Court. The plan provided that Citizens' secured claim was "allowed" (that is, it was a valid obligation) and established a date for repayment. The plan also included a general reservation clause reserving the claims Bishay had against Citizens which, at the time, appeared in the form of the previously filed two-count counterclaim.

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2. Bishay actually caused two Chapter 11 bankruptcy petitions to be filed; one on behalf of himself, the other on behalf of 1095 Commonwealth Ave. Corp. ("1095 Comm. Ave."), a company he wholly owned. Those cases were consolidated. 1095 Comm. Ave. was also an original defendant and plaintiff-in-counterclaim, as were five other Bishay controlled entities. Only Bishay, individually, has filed this Petition.

3. This was but the first incidence of the Bankruptcy Court realizing that Bishay had filed for bankruptcy merely as a delay tactic, as opposed to out of necessity. Ultimately, in a forty-one page decision that addressed much of the post-bankruptcy filing conduct that Bishay later argued resulted in Citizens' liability to him, the Bankruptcy Court expressly found that Bishay was unjustifiably obstreperous and evasive throughout the proceedings in the face of an obviously owed obligation, such that Citizens was justified in increasingly aggressive collection activities. The court ordered Bishay to pay Citizens over $200,000 in legal fees incurred during the bankruptcy proceedings alone. *See In re 1095 Comm. Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997), *aff'd*, 236 B.R. 530 (D. Mass. 1999). That the bankruptcy filing was a tactical gambit employed by Bishay is punctuated by the fact that his later-filed claims against Citizens were based in part on the assertion that the value of his assets, over which Citizens held liens, exceeded his debt to Citizens by nearly nine times.

Of course, all parties had the opportunity to review, comment and argue before the court the provisions of the proposed plan prior to confirmation.

Following the April 1996 confirmation hearing, approval of the plan by the court and expiration of the applicable appeal period, Bishay sought leave in the Superior Court to file an amended counterclaim that raised new and radically different claims based on conduct that both pre-dated the claims alleged in the original counterclaim, and that occurred during the bankruptcy proceeding itself. After one Superior Court judge allowed the amended counterclaim to be filed, a second issued a series of decisions dismissing on summary judgment each and every claim.[4] One of the bases for dismissal of certain claims was the res judicata effect of the confirmed plan of reorganization. It is this determination, affirmed in all respects by the Appeals Court, and the rejection of Bishay's argument that the reservation clause contained in this confirmed plan adequately preserved his later amended claims, that galvanizes this Petition.

Bishay makes a two-prong argument to entice this Court to exercise its rarely used discretion to grant certiorari, neither of which are compelling. First, Bishay says that the Appeals Court was simply wrong in its interpretation of the reservation clause. Such arguments rarely, if ever, justify the exercise of this Court's jurisdiction. Second, Bishay asserts that there is an intractable split amongst the myriad state and federal courts regarding the appropriate application of 11 U.S.C. § 1123(b)(3), and that efficient and effective administration of the bankruptcy process requires this Court's intervention. Contrary to Bishay's assertion, there is no significant split amongst the lower courts. Moreover, the overwhelming

4. Following the last of these orders, the Superior Court awarded Citizens over $360,000 in attorneys' fees and costs. (R. App. 40a-54a)

majority of courts addressing the issue have ruled consistently with the Appeals Court. The few cases that Bishay cited as articulating a different standard are either distinguishable on their facts or simply dicta.

In any event, what Bishay overlooks is that this Court lacks jurisdiction because the dismissal of Bishay's claims is, from the face of the Appeals Court's decision and the unappealed portions of the Superior Court's decisions, supported on separate, adequate and independent state law grounds. Accordingly, the Petition must be denied.

STATEMENT OF FACTS[5]

On June 8, 1988, Neworld Bank, Citizens' predecessor-in-interest, and Bishay entered into a Revolving Credit Agreement, Demand Note and Personal Guarantee (collectively, the "Loan Documents") in the amount of $2,560,000. (P. App. 12a) The Demand Note contained Bishay's unconditional promise to repay on demand. (*Id.*) The Revolving Credit Agreement reiterated the fact that the obligation was payable on demand, but in no event was to be repaid later than June 8, 1989. (P. App. 13a) Bishay did not repay the loan in 1989. Instead, between June 1989 and August 1993, the date for repayment of the debt was extended seven times – the first three times in the form of extension agreements; the last four as forbearance agreements. (P. App. 14a-15a) The last of these extensions, agreed to in August 1993, set a new maturity date of June 30, 1994. (P. App. 15a) This extension also required Bishay to make monthly principal payments of $7,500, plus accrued interest. (*Id.*) On

5. The majority of the facts set forth herein are restated in either the Appeals Court's or the Superior Court's decisions. Those that are not are taken from the 12 volume record appendix that accompanied the appeal before the Appeals Court. *See* Sup. Ct. R. 12.7.

April 14, 1994, Neworld merged into Citizens. (P. App. 16a) On April 18, 1994, Bishay wrote to Neworld and informed it that he was ceasing monthly principal payments due to cash flow problems caused by large expenses incurred in the start up of a new Isuzu automobile dealership. (P. App. 15a) On May 9, 1994, Citizens sent a written default letter to Bishay. (P. App. 16a) Following Bishay's continuing payment default in May 1994, Citizens accelerated the debt by letter dated June 15, 1994. (*Id.*) The August 1993 forbearance agreement otherwise would have matured by its terms two weeks later on June 30, 1994.

Over the next 2½ months, Citizens and Bishay negotiated yet another forbearance agreement, which was ultimately executed on September 16, 1994 (the "September 1994 Agreement"). (P. App. 17a) During this 2½ month period, Bishay was also in negotiations with the Federal Deposit Insurance Corporation (the "FDIC") to work out an unrelated default of a loan that was secured by one of Bishay's properties (1095 Comm. Ave.), which happened to also constitute additional security for the Citizens loan.[6] While negotiating with Bishay, Citizens contacted the FDIC to determine whether it might purchase the FDIC loan so that Citizens would obtain a first lien position on that property to further secure its loan. Nothing came of these discussions (P. App. 16a); however, because they occurred, Bishay leveled repeated allegations of wrongdoing against Citizens during this negotiations period. (*Id.*) Ultimately, a new forbearance agreement was agreed to in the form of the September 1994 Agreement. The September 1994 Agreement provided that: (1) the maturity date was extended to July 31, 1995; (2) Bishay was obligated to make a $1 million partial principal payment on or before January 31, 1995; and (3) Bishay (and any related entities)

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6. Citizens held a second mortgage behind the FDIC.

released all possible claims against Citizens and Neworld. (P. App. 17a-18a)

Bishay failed to make the required $1 million partial principal payment in January 1995. (P. App. 18a) On February 10, 1995, Citizens again executed an extension agreement extending the $1 million payment obligation until April 30, 1995. (*Id.*) On or about March 24, 1995, Bishay made a partial payment of approximately $750,000 towards this $1 million interim obligation. (P. App. 18a-19a) Bishay made no further payments prior to April 30, 1995, and, on May 4, 1995, Citizens again accelerated the obligation. (P. App. 19a) Citizens commenced this action in the Superior Court in June 1995 to recover the balance of the outstanding debt, plus continually accruing interest and costs of collection. (*Id.*)

Bishay filed an answer and counterclaim asserting two counterclaims based solely on Citizens' conduct in the "summer and fall of 1994" that allegedly constituted a breach of the implied covenant of good faith and fair dealing and a violation of Massachusetts General Laws, chapter 93A ("c. 93A"). (*Id.*) Soon thereafter, both Bishay's and 1095 Comm. Ave.'s bankruptcy petitions were filed by Bishay. (P. App. 19a-20a) On November 1, 1995, Bishay and 1095 Comm. Ave. filed a Joint Disclosure Statement (the "Debtors' Disclosure Statement") and Proposed Plan of Reorganization. The Bankruptcy Court refused to approve the Debtors' Disclosure Statement (and, as a result of the preclusion from soliciting creditors' votes, the Proposed Plan of Reorganization), ruling, on December 13, 1995, that it failed to contain adequate information. On December 27, 1995, the Bankruptcy Court appointed a Trustee for Bishay's bankruptcy estate, supplanting Bishay as debtor-in-possession.

In early November 1995, Bishay's counsel made a single inquiry of Citizens' counsel concerning the hypothetical terms of a payoff of Citizens' loan. (R. App. 8a and n.11) Citizens responded that the terms would include payment in full plus a general release of all claims, real or imagined. (*Id.*) Bishay never pursued the issue further; never tendered any money whatsoever; and, indeed, never produced a commitment letter from any new financing source. (*Id.*)

On April 23, 1996, following a two-day evidentiary hearing, the Bankruptcy Court issued an order (the "Confirmation Order") confirming the Chapter 11 plan first proposed by Citizens, as amended by the First and Second Modifications to Chapter 11 Plan (collectively, the "Plan"). (P. App. 20a) The Plan provides, in relevant part, that Citizens' claim is "allowed" in its entirety, and that Bishay's and 1095 Comm. Ave.'s estates "may retain . . . settle, release or prosecute their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")." (P. App. 23a-24a) The only claims that were alleged at the time of confirmation were the two counts in Bishay's pending counterclaim. (P. App. 25a) The Plan also provided for a continuing $500,000 lien on Bishay's assets to secure Citizens' contractual right, under the Loan Documents, to be reimbursed for fees and costs that it might incur in defending itself against Bishay's counterclaims. (P. App. 32a) The amount of the lien was established following an open court colloquy between the judge and counsel in which Citizens' lawyers asserted that Bishay was an excessively litigious individual who had the propensity to litigate out of proportion to the merits of the case. Litigation between Bishay and an unrelated party was highlighted to support this assertion. In response, Bishay's counsel stated that the then-pending two-count counterclaim was discrete and limited and thus only a small lien should be

allowed.[7] Finally, the Plan identified Citizens' claim as "impaired" because repayment of the defaulted loan was not

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7. The colloquy between the Judge and Bishay's counsel (Mr. Murphy) was as follows:

> THE COURT: . . . I want to hear you on why you think $500,000 is excessive. And as I recall what Mr. Baldiga's argument was on Thursday was — and Mr. Baldiga can correct me if I am wrong — but basically he was saying, "Mr. Bishay is litigious." . . . I mean that was what I understood his argument was for the $500,000, but I am willing to hear your argument as to whether it should be some different number.
>
> MR. MURPHY: Oh. I think it should be. I think equating the — what I understand to be the extraordinarily complicated facts and circumstances surrounding the *Chambers* litigation is far different from what I've read a counterclaim that was asserted pre-petition against the Bank in that — in the Norfolk Superior Court which basically said that the bank was engaging in unfair deceptive practices. The bank had coerced him into executing a forbearance agreement, and I think there was one other allegation in the complaint.
>
> * * *
>
> MR. MURPHY: . . . a discrete counterclaim . . .
>
> * * *
>
> THE COURT: . . . I certainly can look at the answer and counterclaim and make some determinations as to how involved the litigation is. . . .
>
> * * *
>
> THE COURT: . . . I also have looked at the defendants' answer and counterclaim. Is there any testimony you want to put on or offer of proof that you want to make,

(Cont'd)

immediate; rather, repayment would not occur until the ensuing December.[8] Bishay never appealed the Confirmation Order.

Two months after confirmation, in June 1996, Citizens served its first summary judgment motion in the Superior Court seeking dismissal of the two-count counterclaim. (P. App. 21a) In August, Bishay sought leave to file an

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(Cont'd)

> Mr. Murphy, with respect to supporting your $250,000 set-aside?
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> * * *
>
> MR. MURPHY: I have nothing further to add. . . .
>
> * * *
>
> THE COURT: . . . I find that $500,000 is fair for the following reasons: based on the offer of proof that — with respect to what the cost of the *Chambers* litigation to date has been, based on my own experience litigating lender liability actions in this Court, and based on the — my reading of the defendants' answer and counterclaim and jury claim in the Norfolk Superior Court action as well as the Affidavit of Mr. Bishay, it seems reasonable for me to conclude that Citizens accepting $500,000 — a $500,000 lien on the assets of 75 Providence Highway is fair.

8. Bishay repeatedly confuses the meaning of an impaired claim under the Bankruptcy Code. A claim is impaired when it is paid in a manner different than that required by the contract creating the obligation in the first instance. Where a debt is due and owing as of the date of the filing of the petition for bankruptcy, a plan that proposes anything other than immediate and total payment renders a claim impaired. *See* 11 U.S.C. § 1124; *In re Tri-Growth Centre City, Ltd.*, 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992) (claim is impaired where proposed plan did not pay defaulted loan as of date of plan).

amended counterclaim.[9] The Superior Court allowed Bishay's motion to amend and denied Citizens' motion for summary judgment, "without prejudice to being renewed as to the amended answer and counterclaim. . . ." (*Id.*)

The new claims asserted by Bishay were not identified in his bankruptcy schedules nor in the Disclosure Statement the Bankruptcy Court otherwise found deficient. Bishay never initiated an adversary proceeding against Citizens alleging these claims prior to confirmation. While Bishay had written a rambling letter to Citizens' Chairman, Lawrence K. Fish, in mid-October 1995 expressing his general dissatisfaction with the entire history of his banking relationship with Citizens up to that point in time,[10] he never followed up on

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9. The amended counterclaim alleged the following six counts: Count I (breach of good faith and fair dealing); Count II (promissory estoppel); Count III (intentional interference with contractual and advantageous relations); Count IV (declaratory judgment as to the validity of the September 1994 Agreement); Count V (intentional infliction of emotional distress); and Count VI (violations of c. 93A). The original two counts of the counterclaim were restated in part in Counts III and VI of the amended counterclaim. The dismissal of those two counts on pure state law grounds has not been appealed.

10. One of the factual misstatements in the Petition is the assertion that this letter contained all of Bishay's claims against Citizens and thus Citizens was on notice of such claims at the time of confirmation. This is wrong. What ultimately became the focus of Bishay's state court claims once his claim of wrongful acceleration was dismissed, was the assertion that Citizens wrongfully refused full repayment of the loan in November 1995. This refusal allegedly prevented Bishay from securing the release of Citizens' liens on $18 million of real estate, which, in turn, prevented him from engaging in an initial public offering, the proceeds from which were earmarked for the opening of a series of automobile superstores across the country that, over the ensuing ten-year period, would have generated profits of over $90 million. Plainly, the October 1995 letter

(Cont'd)

that letter in any manner whatsoever in the ensuing six months leading up to the confirmation hearing. As seen earlier, as of the confirmation hearing, Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim.

In May 1997, Citizens filed its second summary judgment motion seeking dismissal of Bishay's entire counterclaim. (P. App. 21a) In November 1997, the Superior Court allowed Citizens' motion in part and denied it in part. (P. App. 34a) As to the four new counterclaims alleged by Bishay, the court held that they were barred by the res judicata effect of the Plan. The Superior Court held that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify the cause of action reserved." (P. App. 24a) Here, the "language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in the Superior Court at the time of the Order." (P. App. 26a)

As to the two previously pending claims that alleged untoward conduct prior to September 16, 1994, the Superior Court held that those claims were barred by the general release executed by Bishay as part of the September 1994 Agreement.[11] (P. App. 27a-31a) Five subsections of Bishay's

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could not have put Citizens on notice of a claim predicated on alleged conduct that was then over a month from occurring. Significantly, the Appeals Court held that Bishay never tendered payment as alleged and that Citizens never wrongfully refused to accept any such payment. (R. App. 8a and n.11)

11. Bishay sought to vitiate the general release by alleging economic duress. That defense was unsuccessful, and Bishay did not appeal that determination. Indeed, on appeal to the Appeals Court, Bishay argued for reinstatement of those claims only to the extent they alleged conduct post-September 1994. (*See* R. App. 7a)

c. 93A claim survived the first summary judgment motion. (P. App. 34a) Ultimately, after two cross-motions for reconsideration, these five subsections were dismissed on the basis of res judicata,[12] the doctrine of absolute privilege and the inability to prove damages as required under c. 93A. (R. App. 19a-26a; 35a-38a)

Bishay appealed to the Appeals Court which affirmed all of the judgments of the Superior Court.[13] The Appeals Court adopted the reasoning of the Superior Court and found "no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim." (R. App. 4a-5a at n. 6.) The Appeals Court further found no merit to Bishay's assertions that: (1) the classification of Citizens' claim as impaired meant approval of that claim was not final; (2) he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens; or (3) the court should consider statements made by Citizens' counsel at the confirmation hearing. (*Id.*)

The Appeals Court alternatively found that all claims based on post-September 1994 conduct were dismissable for failure of proof. (R. App. 7a-9a)

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12. This dismissal based on res judicata is different from that being appealed here. It arose from the Bankruptcy Court's decision available at *In re 1095 Comm. Ave. Corp.*, 204 B.R. 284. *See* footnote 3, *supra*.

13. The Appeals Court's decision is an unpublished summary decision pursuant to its Rule 1:28. Such decisions "are not to be relied upon or cited as authority in unrelated cases." *Lyons v. Labor Relations Comm'n*, 19 Mass. App. Ct. 562, 566 (1985), *rev'd on other grounds*, 397 Mass. 4981 (1986). This rule exists because such decisions are not vetted by the entire court and, while binding on the parties, may not disclose fully the facts of the case or the rationale of the judges' decision. *Id.* at 566 n.7.

REASONS FOR DENYING THE PETITION

There are several reasons why this Petition must be denied. First, this Court lacks jurisdiction because each of Bishay's claims was or is dismissible on separate, adequate and independent state law grounds. Second, the Appeals Court's decision was correct. Finally, there is no split that must be resolved by this Court.

A. This Court Lacks Jurisdiction Because Separate, Adequate and Independent State Law Grounds Support the Dismissal of the Counterclaims in Their Entirety.

As this Court has often said, jurisdiction is lacking where the decision below rests on separate, adequate and independent state grounds. *E.g.*, *Michigan v. Long*, 463 U.S. 1032, 1037 (1983); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). For this rule to apply, the "state court decision [must] indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds. . . ." *Long*, 463 U.S. at 1042. This case satisfies this requirement even though alternative state law grounds were not expressly articulated as to each and every claim otherwise dismissed under federal res judicata principles. This is so because, as will be shown below, the Superior Court did rule on state law grounds (*e.g.*, enforcing a general release) as to certain of Bishay's claims and that ruling was never appealed. That unappealed ruling must necessarily preclude any and all claims arising out of the same time period. *See, e.g.*, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The four claims (Counts I, II, IV and V) dismissed on res judicata grounds were essentially predicated on two separate and distinct theories. The first was that Citizens had no right to call the loan to begin with in June 1994 and its act of doing so, plus its conduct immediately thereafter,

including the insistence on the terms of the September 1994 Agreement, were all wrongful. (*See* Counts I, subsections a-e, g-i; Count II; Count IV; and Count V). The second theory was based on Citizens' alleged failure to accept tender of full payment in November 1995, which led to retention of its lien on Bishay's assets and hence an unconquerable obstacle to Bishay's grandiose future business plans. This refusal was allegedly motivated by a concealed two-tiered attorney fee agreement that allowed Citizens' lawyers to collect those fees the longer the litigation existed. (*See* Count I, subsections f & k).[14]

1. Bishay Released All Pre-September 1994 Claims

As to the claims based on the wrongful calling of the loan in 1994 and its immediate aftermath, routine preclusion principles would prevent reviving such claims even if the res judicata decision was reversed because the Superior Court has already ruled that the general release contained in the September 1994 Agreement was valid and binding, and that Bishay's defense of economic duress was unfounded. (P. App. 27a-31a) The Superior Court made this ruling in connection with Count III and Count VI, subsections a-e and g-i.[15] Count VI contained all of the identical allegations as Count I. The only difference was that Count I was styled as "breach of contract" and Count VI as "violation of M.G.L. c. 93A, § 11." Bishay never appealed that portion of the Superior

14. Bishay also included certain miscellaneous claims such as alleged improper tampering with a real estate appraisal; filing of a fraudulent complaint; and wrongful attempts to obtain pre-judgment security. All of these claims were disposed of on state law grounds. *See* discussion at p.17.

15. This Court will recall that the two counts of Bishay's original counterclaim were restated in Counts III and VI of the amended counterclaim and that the dismissal of those claims on pure state law grounds (in the first instance) has not been appealed.

Court's decision, and thus, regardless of what happens here, that holding is final. *See, e.g., Federated Dept. Stores, Inc.*, 452 U.S. at 398. (*See* R. App. 7a and n. 9) Thus, subparagraphs a-e and g-i of Count I (breach of contract), which are based on conduct preceding the execution of the general release contained in the September 1994 Agreement are barred as those are the identical allegations of Count VI disposed of by the Superior Court. (*Id.*) Count II (promissory estoppel) is based entirely on pre-September 1994 conduct and is similarly barred. Count III (intentional interference with contractual and advantageous relations) is also based on pre-September 1994 conduct as it relates to allegations involving the FDIC. Count IV for declaratory relief is predicated solely on the assertion that "Citizens Bank coerced Bishay to execute under duress, a September 16, 1994 amendment to the revolving credit-line agreement containing a general release." It is, thus, barred. Those aspects of Count V (emotional distress) that are based on pre-September 1994 conduct are similarly barred.

2. The Post-September 1994 Claims

The claims that remained after the application of the general release involved the assertion that Citizens wrongfully refused to accept payment in full in November 1995 and to release its collateral (*see* amended answer and counterclaim, ¶43 and Count III); that Citizens wrongfully filed the original complaint in June 1995 and then improperly sought pre-judgment security several times (Counts I and VI, subsections 1 and m); that Citizens allegedly tampered with an appraisal in June 1995 during the collection process (Counts I and VI, subsection j); and that Citizens improperly entered into a two-tiered billing arrangement with its counsel and tried to extract from Bishay legal fees to which it was not entitled (Counts I and VI, subsections f and k). Each of these claims has been dismissed on unappealed state law grounds.

With respect to any claim based on Citizens' alleged refusal to accept full repayment of the loan in November

1995 and to thereafter discharge its liens, the Appeals Court ruled as follows:

> Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from any lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c.93A claim to the extent it was based on Citizens Bank's collection efforts.

(R. App. 8a)

To the extent Bishay asserted a claim of emotional distress based on Citizens' collection efforts after September 1994, the Appeals Court also addressed this issue on purely state law grounds:

> Also, Bishay's argument (B.Br. 36-44) attempting to revive his claims for intentional infliction of emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive and unscrupulous and violative of c.93A, fail to raise genuine issues of material fact.

(R. App. 8a-9a)

With respect to any c.93A claim based on the so-called "two-tiered billing arrangement", the Appeals Court stated:

> There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement.

(R. App. 9a)

As for Bishay's claims based on the filing of the original complaint by Citizens in June 1995 and the subsequent attempts through motion practice to secure pre-judgment attachments, the Superior Court dismissed those claims under the state law doctrine of absolute privilege. The Superior Court further rejected Bishay's attempts to escape that privilege by finding there was no factual basis to support claims of abuse of process or malicious prosecution. (R. App. 23a-26a) Bishay did not appeal this ruling to the Appeals Court.

Finally, Bishay's claim based on alleged interference with a real estate appraisal (Counts I and VI, subsection j) was dismissed by the trial court on res judicata grounds stemming from the post confirmation hearing on fees and expenses to be assessed. (R. App. 20a-21a) *See also In re 1095 Comm. Ave. Corp.*, 204 B.R. at 305. This ruling of the Superior Court was not appealed.

As can be seen, every claim and every factual predicate was expressly addressed on separate, adequate and independent state law grounds either by the Appeals Court or in unappealed portions of the Superior Court's decisions. Thus, under this Court's precedent in *Michigan v. Long* and *Caldwell v. Mississippi*, jurisdiction is lacking and the Petition must be denied.

B. The Appeals Court Was Correct

As to the Appeals Court's application of federal res judicata principles to bankruptcy plans of reorganization, Bishay argues the decision is wrong because, although supported by ample case authority, it purportedly does not find direct support in the language of 11 U.S.C. § 1123(b)(3). (Pet. at 7-8) This Petition constitutes the first time § 1123(b)(3) has been mentioned in these proceedings, and it is a red herring. The essence of Bishay's new argument is that § 1123(b)(3) creates a more lenient exception to res judicata rules than otherwise abounds under federal common law. The argument has no merit as § 1123 only identifies the things that a plan of reorganization permissibly may do; it does not say how they must be done. Thus, Congress left it for the courts to determine the "how to." Of course, the contents of a plan of reorganization are subject to common law principles like res judicata. *In re Justice Oaks II, Ltd.*, 898 F. 2d 1544, 1550 (11th Cir. 1990).

Quite naturally, res judicata principles in the bankruptcy arena are grounded first in general federal res judicata jurisprudence. The general rule is that later brought claims that were or could have been adjudicated in a prior proceeding will be precluded unless the previous action involved an express reservation of these claims. *E.g.*, *Apparel Art Int'l v. Amertex Enters. Ltd.*, 48 F.3d 576, 586 (1st Cir. 1995). Because confirmation orders are final orders for the purpose of res judicata principles, and reorganization plans are permitted to do what courts otherwise have the inherent authority to accomplish (i.e., expressly reserve claims), the question becomes what language in a plan is sufficient to constitute an express reservation. The vast majority of courts ruling on this question have held that the language of the reservation clause must specifically identify the claims to be reserved. *See*, *e.g.*, *D&K Prop. Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d 257, 261 (7th Cir. 1997) ("[a] blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan."); *In re American Preferred Prescription, Inc.*, 266 B.R. 273, 277, 279 (E.D.N.Y. 2000) (a claim brought pursuant to a blanket reservation, which does not describe with specificity what actions are reserved for post-confirmation determination, will be barred by res judicata); *Micro-Time Mgmt. Sys., Inc. v. Allard & Fish, P.C.*, 983 F.2d 1067 (6th Cir.) (table), *cert. den.*, 510 U.S. 906 (1993) (general language reserving to a debtor the right to bring post-confirmation suits nonetheless allows opponents to raise res judicata defense); *In re Kelly*, 199 B.R. 698, 704 (9th Cir. BAP 1996) (general reservation of rights in confirmed plan insufficient to prevent application of res judicata); *In re Tippins*, 221 B.R. 11, 23 (Bankr. N.D. Ala. 1998) (failure of debtor to list specific claims in schedules subjected later filed actions to res judicata defense despite general reservation of claims language in plan); *In re County of Orange*, 219 B.R. 543, 558 (Bankr. C.D. Cal. 1997) (where debtor fails to mention specific cause of action in schedules, disclosure statement or plan, general reservation clause insufficient to prevent application of res judicata); *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) ("blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding because it did not enable the value of [debtor's successor's] claims to be taken into account in the disposition of the debtor's estate."); *Westland Oil Dev. Corp. v. MCorp. Mgmt. Solutions, Inc.*, 157 B.R. 100, 103 (S.D. Tex. 1993) ("[Debtor] knew about the claim, was mad about it, and hid it within the murky language of the general retention clause."); *In re Huntsville Small Engines, Inc.*, 228 B.R. 9, 13 (Bankr. N.D. Ala. 1998) (finding preference action precluded by plan confirmation under doctrine of res judicata where plan and disclosure statement "only contained a general retention clause reserving the debtor's right to pursue post-confirmation all pre-petition causes of action without specifically disclosing the cause of action against [creditor]."). *See also In re Howe*, 913 F.2d 1138, 1147 (5th Cir. 1990) (holding that "when a confirmed

plan discloses and specifically treats the creditor's claim, and the debtor has had a full opportunity to contest the creditor's claim in an adversary proceeding that is, in effect, settled in the plan, the debtor cannot collaterally attack the bankruptcy court's decision five years later in an action based on the same transaction."). *Compare In re Hooker Invs., Inc.*, 162 B.R. 426, 432-34 (Bankr. S.D.N.Y. 1993) (debtor not precluded by res judicata where plan expressly reserved the claims listed in debtor's bankruptcy schedules, and schedules identified specific causes of action against particular parties).

Federal bankruptcy policy considerations amply support these holdings. First and foremost, the plan of reorganization, once approved, resolves the rights and obligations of the debtor and creditors that existed prior to that time. With respect to a specific creditor's claims, the choice exists to either have the claim "allowed" or to contest it. If the latter, a hearing can be held either pre- or post-confirmation to address the merits. But if the former, it means that the creditor's claim is found valid and binding on the debtor, with only the means of repayment left to plan treatment. *See In re Duke*, 153 B.R. 913, 917 (N.D. Ala. 1993) (an "allowed claim" is a claim fixed as to all objections, counterclaims or set-offs). Under Bishay's position, a creditor's claim could be found valid and binding (i.e., allowed), and yet subject to being found invalid and non-binding in later litigation based solely on a general, vague reservation clause that makes no mention whatsoever of defenses to the underlying claim. This is an especially absurd result when one considers that in the meanwhile, the plan may be consummated and the claim paid in full.

Similarly, a plan may be consensual or opposed. A plan is consensual where all creditors with a right to vote agree to the plan's provisions. In order for that process to occur, the plan must be disseminated ahead of time for review, consultation and, perhaps, negotiation. If objected to, the court will address those objections at the confirmation hearing. In order for a creditor to properly decide whether to consent or oppose a

proposed plan, it must know how the plan proposes to treat it. Thus, does the plan propose to "allow" or contest the claim of any particular creditor; will the claim be paid in accordance with the original contract between the parties (assuming one exists), or will it be paid pursuant to a different time-table or in a lesser amount, rendering the claim "impaired"; and will the plan, once confirmed, be the end of disputes, if any, between the parties based on what occurred up to the point of confirmation. In order for a creditor to understand exactly what it is that is being proposed, specificity is required.

This case punctuates that need. Pursuant to the Plan, Citizens' secured claim against Bishay was deemed "allowed," meaning that the claim was a legally valid and binding claim against which Bishay had no defenses. *See In re Duke*, 153 B.R. at 917. The Plan also contained a general reservation clause. At the time the Plan was confirmed, Bishay had filed a two-count counterclaim to the original complaint filed by Citizens. That counterclaim was limited to two causes of action arising out of Citizens' collection actions in the summer of 1994. They were so-called set off claims very limited in scope and presenting very little chance of exposure to Citizens. Bishay's bankruptcy counsel confirmed that these were the only two claims Bishay had and was seeking to preserve. (*See* footnote 7, *supra*.) In any event, these two limited causes of action were the only expressly identified claims that the reservation clause preserved and which Citizens was prepared to deal with in subsequent state court litigation. What was not identified were claims that went to the validity of the loan obligation to begin with. What was also not identified was an alleged $100 million of damages allegedly arising out of Citizens' efforts to collect a concededly owed $2.5 million debt. Under Bishay's position, the entire confirmation hearing potentially becomes an academic exercise: the claim is initially allowed, and upon consummation of the Plan, theoretically paid, subject to being declared null and void and any payment returned. The impracticalities of such an approach are obvious.

As the Southern District of Texas aptly stated:

> The institution of bankruptcy exists to give debtors a fresh start, not to allow debtors to seek revenge against creditors who were difficult in earlier business dealings. General retention clauses are not convenient hiding places for debtors. While a debtor is not forced to abandon claims before they are known, a debtor must disclose those claims that are likely. A claim with potential is a potential asset. The creditors have a right to know what the debtor's assets are even though the potential may be contingent, dependent, or conditional. While [the debtor] did not have to give an exact dollar value for the claim, it was obliged to give an estimate. Rather than make a good faith attempt at disclosure, [the debtor] chose not to estimate a value for this claim on the ground that "causes of action are difficult to value." The code requires adequate disclosure, not selective disclosure. Because [the debtor] failed to disclose its claim against [the creditor], it will be barred.

Westland Oil Dev. Corp., 157 B.R. at 103.

1. There Is No Basis For Interpreting The Plan Against Citizens

Faced with his own failure to properly preserve the claims he first filed post-confirmation, Bishay proffers here, as he did below, several arguments why the reservation clause should be rewritten. One of his arguments is that the Plan is essentially a contract that was drafted by Citizens, and thus should be interpreted against Citizens (i.e., expansively). However, Bishay's argument overlooks the essential nature

of the confirmation process and the basic obligations each party has to protect its own interests. In the first place, a confirmed plan is simply not subject to rules of contract construction. As one court put it:

> [a] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable.

Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

Moreover, the Plan, though originally presented by Citizens due to Bishay's intransigence in putting forth his own plan, was not simply accepted by the court or the parties. Rather, it was subject to significant input from all sides. In this context, it was up to Bishay (and his lawyers) to be sure Bishay's claims were preserved to the extent he wanted them preserved. As the court stated in *In re DiBerto*:

> The confirmation of a plan under Chapter 11 creates new contractual obligations of the reorganized debtor. In that context, parties-in-interest are obligated to make sure that they have no problem with the literal language of the new contractual obligations and provisions dealing with the disposition of the assets of the debtor.

171 B.R. 461, 477 (Bankr. D.N.H. 1994).[16]

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16. To the extent that Bishay is dissatisfied with the legal effect of the language agreed to in the Plan, that is an issue between Bishay and his bankruptcy counsel. *See In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 546 (M.D. Tenn. 1983) (parties "may not be relieved

(Cont'd)

The quintessential party-in-interest is of course the debtor himself. Bishay had the opportunity to negotiate and/or object to the Plan as modified prior to consummation. He had the opportunity to argue to the Bankruptcy Court the equities of the Plan then under consideration. Having allowed that process to run its course and, then, having failed to appeal, Bishay cannot ask that the Plan be rewritten.

2. The Alleged "Knowledge" of Bishay's Claims is Irrelevant

Bishay's assertion that Citizens knew what claims Bishay thought he had against Citizens as of the confirmation date, and thus knew the intent of the parties and the court in adopting the reservation clause, is without merit. As of the confirmation date, the only claims Bishay had in any way affirmatively asserted were in the two-count counterclaim filed in the Superior Court the preceding summer. The letter Bishay refers to was written more than six months prior to the confirmation hearing. After that date, Bishay had submitted his proposed plan and disclosure statement and never mentioned any of these claims.[17] In fact, despite the deficiencies found by the court in Bishay's proposed plan with respect to Citizens' secured claim, it treated those claims as "allowed," proposed to pay Citizens in full within one

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(Cont'd)
from the consequences of decisions deliberately made by their attorney, although subsequent events may reveal that such decisions were unwise").

17. At page 9 of his Petition, Bishay asserts that the "bank acknowledged in its Disclosure Statement that those claims included the ones in the comprehensive itemized list that Bishay had given Citizens in October 1995." This is insupportable on the record. The disclosure statement that Citizens would have filed with its proposed plan was never submitted by either party in any pleading in the lower courts and is thus not part of the record below. (*See* Sup. Ct. R. 12.7).

year of plan approval and made no mention of any claims whatsoever. In addition, as set forth in footnote 7 above, Bishay's bankruptcy attorney represented to the court in opposing the request for a continuing lien on Bishay's assets to defray future litigation costs, that the only claims Bishay had against Citizens were those set forth in the two-count counterclaim then on file. Thus, the October letter appeared as nothing more than an attempt to extract a settlement, which was, in fact, the caption at the top of the letter. Thus, the assertion that Citizens had "knowledge" of Bishay's claims is insupportable. Moreover, importing an intent element into reservation clauses is an invitation to endless litigation. By definition, a general reservation clause is going to be ambiguous precisely because it is so vague. Thus, courts will forever be required to hold evidentiary hearings to elicit the parties' views as to what they "intended" the clause to cover. Under analogous circumstances, the Second Circuit Court of Appeals has held that open-court statements by lawyers or judges as to their belief in the scope of a reservation clause were irrelevant to determining the legal ramifications of such clauses. *See Sure Snap Corp. v. State Street Bank & Trust Co.*, 948 F. 2d 869, 873 (2d Cir. 1991).

C. There is No Split Worthy of This Court's Attention

In a final attempt to entice this Court to grant certiorari, Bishay claims that there are three well-developed schools of thought as to the interpretation of 11 U.S.C. § 1123 such that this Court's guidance is required. Putting aside the question of whether this statute truly affects this litigation, there is no split worthy of this Court's attention. What there really is, however, is a majority rule (*e.g.*, *D&K Properties*) that has been refined by a few cases (*e.g.*, *Hooker*). That majority rule is, of course, that a general reservation clause that seeks generally to reserve all claims, in fact reserves nothing. The gloss put on by cases like *Hooker* is that if the

debtor identifies his claims in his schedules, and references the schedules in the reservation clause, then the reservation clause preserves those claims.[18] The two cases from the Bankruptcy Court in the District of Delaware that Bishay relies on as support for a third line of cases that "per se" uphold general reservation clauses do nothing of the sort. In those cases, a creditor argued that the confirmed plan precluded a post-confirmation preference action against it. In holding that res judicata was not a bar because the preference action was not based on the same cause of action as the confirmation proceedings, the court stated:

> Whereas the prior "action" addressed the treatment of [the creditor's] claims under the terms of the Plan, the instant adversary proceeding seeks avoidance of the Alleged Transfer pursuant to §§ 547 and 550. Although both actions may share some facts in common in that they both arose out of [the creditor's] pre-petition business relationship with [the debtor], both the "factual underpinnings" and "theory of" an avoidance action are completely different than a determination on the allowability and proper treatment of a creditor's claim under a plan of reorganization. As such, the instant proceeding involves an entirely different cause of action than the claims treatment in the prior confirmation hearing and therefore, res judicata does not apply.

Peltz v. Worldnet Corp., 280 B.R. 573, 587 (Bankr. D. Del. 2002). *See Cohen v. TIC Fin. Sys.*, 279 B.R. 145, 155 (Bankr. D. Del. 2002) (same).

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18. Of course, Bishay did neither.

Indeed, the holdings of these cases are rooted in general res judicata jurisprudence, and not in the particularities of the language of a reservation clause. *Peltz*, 280 B.R. at 587; *Cohen*, 279 B.R. at 155. The so-called "per-se" rule is not only merely dicta, but the court limited its rationale to preference actions. *Peltz*, 280 B.R. at 594; *Cohen*, 279 B.R. at 161. This Court need not resolve anything. This Petition should be denied.

CONCLUSION

For the reasons set forth above, the Respondent requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES W. STOLL
Counsel of Record
ELISE BUSNY
BROWN RUDNICK
BERLACK ISRAELS LLP
One Financial Center
Boston, MA 02111
(617) 856-8200

Counsel for Respondent

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